

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**YOUNG WOMEN'S CHRISTIAN ASSOCIATION
OF WESTERN MASSACHUSETTS,**

and

Case 1-CA-42618

**INTERNATIONAL UNION , UNITED AUTOMOBILE,
AEROSPACE & AGRICULTURAL WORKERS OF
AMERICA, LOCAL 2322, AFL-CIO.**

**Gene Switzer, Esquire
of Boston, Massachusetts, for the General Counsel**

**Jay Presser, Esquire
of Springfield, Massachusetts , for the Respondent**

**Shelley B. Kroll, Esquire
of Boston, Massachusetts, for the Charging Party**

DECISION

Statement of the Case

David I. Goldman, Administrative Law Judge. This case was submitted by the parties for decision based on a stipulated record. By order dated December 7, 2005, I granted the parties' Joint Motion and Stipulation of Facts, accepted the stipulated facts proposed by the parties and agreed to waive the hearing in this case. Briefs were filed by all parties on January 11, 2006.

The charge in this case was filed by the United Automobile, Aerospace & Agricultural Workers of America, Local 2322 (Union or Charging Party) June 9, 2005.¹ The complaint issued September 30, and alleges that the Young Women's Christian Association of Western Massachusetts (YWCA or Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act). The YWCA filed a timely answer, denying that it had violated the Act.

On the entire record, and after considering the briefs filed by counsel for the General Counsel, Respondent, and Charging Party, I make the following findings of fact, conclusions of law, and recommendations.

¹All dates are in 2005 unless otherwise indicated.

I. Jurisdiction

The YWCA is a corporation operating a social services agency at its facility in Springfield, Massachusetts. It annually derives gross revenues in excess of \$250,000. It purchases and receives at its Springfield facility goods valued in excess of \$5,000 directly from points outside the Commonwealth of Massachusetts. The parties stipulate and I find that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties also stipulate and I also find that at all material times Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The General Counsel alleges that the YWCA violated Section 8(a)(1) and (5) by withdrawing recognition from the Union and by failing and refusing to execute a collective-bargaining agreement previously reached with the Union. The YWCA essentially admits the conduct, but defends on the grounds—the fact of which is conceded by the General Counsel—that the Union lost majority support within the bargaining unit, through no fault of the YWCA, after the parties reached an oral agreement on all substantive terms to be included in the written collective-bargaining agreement. The YWCA contends that this loss of majority support after reaching oral agreement with the Union privileges—indeed, requires—its refusal to execute the collective-bargaining agreement and, similarly, privileges and requires its withdrawal of recognition from the Union.

III. Factual Findings²

By letter dated September 8, 2003, the Union advised the YWCA that it represented a majority of the YWCA's direct service provider employees. The Union proposed to prove its majority status in an "appropriate forum" and expressed a preference for verification by an "impartial third party." In addition to requesting recognition from the YWCA directly, on September 9, 2003, the Union filed a representation petition with the Board.

By letter dated September 11, 2003, the YWCA responded to the Union's September 8 letter and declined to recognize the Union as its employees' bargaining representative. In its letter, the YWCA referenced the Union's representation petition and expressed the intent to permit Board processes to determine the employees' desires regarding union representation.

After a Board election conducted on October 17, 2003, the Union was certified on October 27, 2003 as the exclusive collective-bargaining representative for a bargaining unit of the YWCA's employees at facilities in Hampden and Hampshire counties. The certified bargaining unit consisted of:

All full-time and regular part-time employees employed by Respondent at its facilities located in Hampden and Hampshire counties including direct service advocates, service coordinators/case managers, hotline counselors, community educators, father's and youth outreach workers, program cook, housing advocates, construction managers, construction trainer, coordinator of

²The following factual findings are derived from the parties' Stipulation of Facts.

operations, and youth development, education coordinator, teacher, counselor/case manager, rape crisis counselor, program coordinator, site coordinators, staff associates, safeplan advocates, mentor coordinators, counselor/volunteer coordinator, and youth development program coordinator, but excluding all office clerical employees, managerial employees, professional employees, confidential employees, casual employees, all relief staff, building maintenance, custodians, guards, site/program directors, and supervisors as defined in the Act.

In early 2004, the YWCA and the Union commenced negotiations for a collective-bargaining agreement. During negotiations the Union was represented by International Representatives Henry Fijalkowski and Joseph Calvo, and Servicing Representative Tim Scott, in addition to several bargaining unit employees. The YWCA's chief spokesperson at negotiations was Attorney Ralph Abbott. Also present at the negotiations on behalf of the YWCA were Human Resource Coordinator Kimberly L. Chatel and Chief Financial Officer Suzy M. Cieboter. Between February and December 2004, the parties generally met to negotiate on a weekly basis. During this period the parties reached tentative agreement on numerous issues.³

The parties' ground rules for bargaining provided that as they reached agreement on a particular contractual provision, each party initialed a tentative agreement on that provision. On April 5, 2005, the YWCA presented the Union with what it termed "a final offer" for a collective-bargaining agreement. In addition to the provisions already tentatively agreed to, the "final offer" included provisions for wages, group health and dental insurance, short-term and long term disability insurance, retirement plans, hours of work and overtime, personal days, and holidays. As part of its final offer, the YWCA proposed that the length of the contract would be two years. With respect to holidays, the YWCA's final contract offer included a provision to permit the Union, at its sole discretion, to designate a floating holiday.

Pursuant to the parties' negotiating ground rules, any agreement between the parties was subject to ratification by the Union's membership. Union Representatives Scott and Calvo advised the YWCA that the Union would present the YWCA's final contract offer to the Union membership for a ratification vote. Calvo and Scott explained that if the membership rejected the YWCA's final contract offer, the membership could also vote to authorize a strike. The Union scheduled the ratification vote for April 8, but then postponed it until April 20.

³These issues included the following: recognition clause with a unit description; preamble; duration and renewal; scope of agreement; no-strikes no-lockouts; union security and dues deduction; definitions of regular full-time, regular part-time, other part-time and temporary employees and relief staff; management rights; probationary period; vacations; flextime scheduling; leave without pay; bereavement; grievance arbitration procedure; discipline and discharge; labor-management committee; resignation; reduction-in-force or work hours; evaluations; personnel files; union business; separability; seniority; job descriptions; health and safety; job posting; bulletin boards; non-discrimination; worker's compensation; jury duty; military leave; professional liability insurance; direct deposit; and transportation reimbursement.

On April 7, YWCA Executive Director Mary Reardon Johnson sent a letter to bargaining unit employees encouraging them to attend the Union's meeting and ratify the proposed collective-bargaining agreement. The letter discussed the final offer and warned that "a strike or even the threat of a strike would not be good for you, your families or our clients who rely so much on us." The letter added that "[i]t is our intention to continue offering our services to our clients regardless of the outcome of any strike vote."

Between April 8 and April 20, the Union held several informational meetings for its membership in preparation for the April 20 ratification vote.

On April 19, YWCA Executive Director Johnson sent a second letter to bargaining unit employees encouraging them to attend the meeting and ratify the proposed contract. The letter also set out what Ms. Johnson described as "the cold, hard facts about what a strike could mean to you," which, as described in the letter, included the cessation of employer contributions to medical insurance, the possibility of permanent replacement, and the unavailability of unemployment compensation benefits to strikers.

On April 20, the Union held a ratification vote on the YWCA's contract offer. The membership voted to accept the offer. On or about April 20, after the vote, Union Representative Scott telephoned YWCA Attorney Abbott and told him that the membership had ratified and accepted the YWCA's offer for a collective-bargaining agreement. In this conversation, Attorney Abbott offered to reduce to writing the final and complete agreed-upon contract for signature by the parties.

With the exception of the Union still having to designate a floating holiday, on or about April 20, the parties had orally reached an agreement on all of the terms and conditions of employment to be included in the collective-bargaining agreement.

On April 25 Union Representative Scott issued a letter to the employees in the bargaining unit to congratulate them on having ratified the contract. The letter stated, in part:

The union contract covers various aspects of your wages, benefits, hours of work and working conditions. As soon as we proof read the final version and sign off on it, copies will be made available for all YWCA members.

In the mean[time] the contract as agreed upon is in effect and if you have any questions about it or if you have any concerns about anything pertaining to your job, especially in regards to any disciplinary actions taken against you, please contact us. See the enclosed form to learn more about your rights.

An important next step for your union at the YWCA is to elect union stewards. Stewards will be YWCA employees who will serve as your primary union leadership who will represent all YWCA union employees in the workplace. Your new contract states, "The Employer shall recognize one steward from each worksite, elected by the Union." The election process and timeline is detailed in the enclosed flyer.

After union stewards are elected, union bulleting [sic] boards will be put up at each worksite. The contract states, "The YWCA will provide a bulleting [sic] board at each worksite for the Union to post notices of Union meetings, election

of officers or notices of Union recreational, educational or social activities. Each bulletin board will be placed in an area accessible to employees.” Bulletin boards play an important role in educating and keeping union members informed about their union. Regular union membership meetings for all YWCA union members to attend will also be scheduled once we have stewards in place.

On May 2, at Attorney Abbott's request, Union Representative Scott advised Abbott, by telephone, of the floating holiday that the Union had chosen. By May 2, when the Union advised the YWCA of the floating holiday, the YWCA and the Union had orally reached a complete agreement on all of the terms and conditions of employment to be included in a collective-bargaining agreement.

As of this time, May 2, the YWCA had no objective evidence that the Union did not represent a majority of the bargaining unit employees.

Attorney Abbott reduced the agreed-upon contract to writing in anticipation of its execution and on May 6 forwarded it to the YWCA's Chatel and Cieboter for review.

By letter dated May 12, Union Representative Scott notified the YWCA that, in accordance with the contractual provision of the new contract that allows the Union to have five stewards, three employees had been selected and the Union was making an effort to fill the two remaining slots. Also on this date, Scott left a telephone message for Chatel asking about the status of the draft contract and requesting that she advise management to start applying the terms of the contract. Scott followed up this telephone message with an e-mail to Chatel. On May 13, Chatel sent an e-mail to Scott responding to his May 12 inquiries. She stated:

Hi Tim:

Suzy and I have had a chance to review the contract and we e-mailed some questions to Ralph. He may need to make some changes but Ralph will forward to you when it is complete. I apologize for the delay, but things have been extremely hectic.

Regarding the concern you raised about directors telling staff that the contract is not in effect: Since the contract is not complete and neither management nor staff have received a copy, there appears to be some confusion around this issue. We plan to clarify things as soon as possible when the draft of the contract is complete. We plan to distribute a copy of the contract as well as discuss with supervisors. In the meantime, if there are any issues or questions, we will direct supervisors to contact Suzy or myself with questions.

Thanks,

Kim

As of May 19, there were 64 employees in the bargaining unit. On May 13, the YWCA received 34 signed and dated cards from bargaining unit employees. Each signed and dated card stated that the “undersigned employees of the **YWCA of Western Massachusetts** no longer wants representation from Local 2322 of the united automobile; aerospace and agricultural implement workers of America.” The card added, “**I no longer want to be**

represented by the UAW Local 2322 and I would like action to be taken to get them out of our agency, so we can get our voices back! [Emphasis in original.]”

The 34 cards were signed on the following dates:

| | |
|----------------|----------------|
| April 14 | 6 cards signed |
| April 16 | 3 cards signed |
| April 18..... | 4 cards signed |
| April 19..... | 6 cards signed |
| April 20 | 6 cards signed |
| April 21 | 2 cards signed |
| April 23 | 2 cards signed |
| April 25 | 1 card signed |
| May 8 | 2 cards signed |
| May 9 | 1 card signed |
| May 12 | 1 card signed |

The YWCA did not receive the cards until May 13. But based on this stipulated evidence, the 32nd card, in a bargaining unit of 64 employees, was signed May 8. Accordingly, as of May 8, 50 percent of the bargaining unit had indicated through signed cards provided to Respondent May 13 that they “no longer wanted to be represented by [the Union].” May 8 was 18 days after April 20, the date that the Union accepted the YWCA’s final contract offer and on which (with the exception of designating the floating holiday) the parties had orally reached an agreement on all of the terms and conditions of employment to be included in the collective-bargaining agreement. It was six days after May 2, the date on which the Union advised the YWCA of the floating holiday it had selected, at which time “Respondent and the Union had orally reached a complete agreement on all of the terms and conditions of employment of the Unit to be included in a collective bargaining agreement.”

By letter dated May 19, the YWCA informed the Union that it would not execute the agreed-upon collective-bargaining agreement and that it was withdrawing recognition of the Union as the collective-bargaining representative of the unit employees. In this letter, the YWCA stated that it had objective evidence that the Union had lost majority status among the unit employees, in the form of the cards signed by 34 of the 64 unit employees stating that they did not wish to be represented by the Union. The sole and exclusive basis for the YWCA’s withdrawal of recognition and its refusal to execute the agreed-upon contract, was the May 13 receipt of the cards referred to above. Had the YWCA not received those cards the collective-bargaining agreement would have been reduced to writing and executed by the parties.⁴

⁴Stipulated Fact No. 32 states: “At all times since at least May 2, 2005, Respondent has failed and refused to execute a written contract encompassing all of the terms and conditions of employment of the Unit that the parties had final agreement on” This stipulation is in error, presumably inadvertently agreed to by both parties, and I cannot accept it. It is at odds with other stipulated evidence that shows that at least until May 13 when the YWCA received the employee cards repudiating the Union the YWCA attorney was laboring to reduce the agreement to writing in preparation for execution. The first indication that the YWCA gave to the Union that it would not execute the agreement was on May 19.

Analysis and Conclusions

A. Introduction

The question here is whether an employer may unilaterally withdraw recognition from its employees' union and refuse to execute a written version of a labor agreement, when, after reaching agreement with the union, the employer is confronted with undisputed evidence that—again, after reaching agreement—a majority of the union-represented employees have indicated they no longer want to be represented by the union.

The answer to this question implicates the Act's overriding policy of industrial peace, the twin goals of the Act of employee free choice and stability of labor relations, and the manner in which the Board has accommodated these goals. And the question requires consideration of the difference between the right to utilize the Board's election procedures and the right of an employer, acting on behalf of its employees, to unilaterally reject its bargaining obligation and withdraw recognition from the certified employee representative.

But while the question presented by this case implicates fundamental objectives of the Act, the answer, I believe, is clear. Under longstanding Board law and policy, it is settled that once parties enter into an agreement—as the parties manifestly did here—a contract is formed and the employer cannot, without committing an unfair labor practice, refuse to execute the agreement and unilaterally withdraw recognition based on a union's loss of majority support that did not occur until after the formation of the contract. And this is true notwithstanding the equally longstanding Board policy in representation cases that permits use of the Board's election processes to raise questions of representation until such time as the parties commit their agreement to a signed and written document.

Accordingly, as discussed herein, I find that since May 19, by withdrawing recognition from the Union and failing and refusing to execute the agreement it reached with the Union, the YWCA violated Section 8(a)(1) and (5) of the Act.⁵

1. The conclusive presumption of majority support during the term of a labor agreement

The Supreme Court has recognized that “[t]he object of the National Labor Relations Act is industrial peace and stability, fostered by collective bargaining agreements providing for the orderly resolution of labor disputes between workers and employers.” *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996). “To such ends, the Board has adopted various presumptions about the existence of majority support for a union within a bargaining unit, the precondition for service as its exclusive representative.” *Id.* at 785–786. As the Board has explained:

⁵Sec. 8(a)(5) of the Act states that it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). Sec. 8(d) of the Act defines to “bargain collectively” to include “the execution of a written contract incorporating any agreement reached if requested by either party.” 29 U.S.C. § 158(d).

Absent specific statutory direction, the Board has been guided by the Act's clear mandate to give effect to employees' free choice of bargaining representatives. The Board has also recognized that, for employees' choices to be meaningful, collective bargaining relationships must be given a chance to bear fruit and so must not be subject to constant challenges. Therefore from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status.⁶

The presumption of majority support is usually rebuttable, but in some periods of a collective-bargaining relationship it is conclusive. One such period is during the life of a collective-bargaining agreement that is not longer than three years duration. Thus, it is a "long-established principle that a union enjoys an irrebuttable presumption of majority support during the term of a collective-bargaining agreement, up to 3 years." *Trailmobile Trailer, LLC*, 343 NLRB No. 17, slip op. 3–4 (2004); *Levitz*, supra at fn. 17 ("a union's majority status may not be questioned during the life of a collective bargaining agreement up to 3 years"); *Auciello Iron Works*, 517 U.S. at 791 (rejecting an exception "to the conclusive presumption [of majority support] arising at the moment a collective-bargaining contract offer has been accepted").

2. The agreement

It has been black letter law, for over 60 years, that "[w]hen an oral agreement is reached as to the terms of a collective-bargaining contract, each party is obligated, at the request of the other, to execute that contract when reduced to writing." *Liberty Pavilion Nursing Home*, 259 NLRB 1249 (1982). At least since the Supreme Court's decision in *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941), "it is well established that an employer's failure to reduce to writing an agreement reached with a union constitutes an unlawful refusal to bargain." *Ethan Enterprises Inc.*, 342 NLRB No. 15, slip op. at 5 (2004), enf'd. 178 LRRM (BNA) (9th Cir. 2005).

However, it is also the case that an oral agreement on the terms of a collective-bargaining contract is binding and enforceable prior to being written and executed.⁷ Indeed,

⁶*Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 (2001).

⁷*Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 226 (D.C. Cir. 1996) ("An unexecuted CBA is valid and binding upon the parties"); *Automobile Mechanics Local No. 701*, 280 NLRB 1312 (1986); *North Broths. Ford, Inc.*, 220 NLRB 1021 fn. 8 (1975) ("The existence of an agreement is not dependent upon its written incorporation in final form"); *Utility Tree Service*, 215 NLRB 806, 807 (1974) ("we find that on March 9 [upon notification to the employer that its contract offer had been accepted] a final and binding collective-bargaining contract was consummated between the Respondent and the [union], and that the Respondent had been duly notified"), motion to reopen the record denied, 218 NLRB 784 (1975), enf'd. 539 F.2d 718 (9th Cir. 1976); *East Texas Steel Castings Co.*, 191 NLRB 113 (1971) (contract came into being upon union telegram notifying employer of acceptance of company proposal), enf'd. 457 F.2d 879 (5th Cir.), cert. denied 409 U.S. 852 (1972); *F.W. Means & Co.*, 157 NLRB 1434 (1966) (in dicta: "we disagree with the Trial Examiner's view that an oral agreement is not binding on the parties until reduced to writing"), enf. denied on other grounds, 377 F.2d 683 (7th Cir. 1967); *Teamsters Local 294 (Conway's Express)*, 87 NLRB 972 (1949) (rejecting General Counsel's claim that oral agreements are not binding on the parties).

absent a request by either party, there is no requirement that a labor agreement ever be reduced to writing.⁸

The Board holds that a contract is formed (and thereafter must be reduced to writing and executed upon the demand of either party) when the parties have reached mutual agreement on all material and substantive terms and conditions of employment to be incorporated in the bargaining agreement. *Transit Service Corp.*, 312 NLRB 477, 481 (1993).

In this case the parties stipulate that “[b]y May 2, 2005, when the Union advised Respondent of the floating holiday it had selected, Respondent and the Union had orally reached a complete agreement on all of the terms and conditions of employment of the Unit to be included in a collective bargaining agreement.” (Stipulated Fact No. 21). Indeed, the parties refer to the “collective bargaining agreement that the parties had reached full agreement on by May 2, 2005.” (Stipulated Fact No. 30). Thus, the parties agree that no later than May 2, the parties had reached “oral agreement on all the substantive terms of a collective bargaining agreement.” (Joint Statement of Issue Presented).⁹

⁸*NLRB v. Haberman Construction Co.*, 641 F.2d 351, 355–56 (5th Cir. 1981) (“It is well settled that a union and employer’s adoption of a labor contract is not dependent on the reduction to writing of their intention to be bound”) [footnote omitted]; *NLRB v. Scientific Nutrition Corp.*, 180 F.2d 447, 449 (9th Cir. 1950) (“The (National Labor Relations) Act, it is to be remembered, does not require contracts between employer and the union to be in any particular form, or that they be reduced to writing”); *Ben Pekin Corp.*, 181 NLRB 1025 (1970) (“Respondent recognized the Union and had an oral collective-bargaining agreement with the Union covering Respondent’s flat janitors. While said contract was not reduced to writing, it nevertheless was valid between the parties”), *enfd.* 452 F.2d 205 (7th Cir. 1971); *Pacific Iron & Metal Co.*, 175 NLRB 604, 606 (1969) (“the Act does not require that a collective-bargaining agreement be reduced to writing unless either party demands it”), citing *Rabouin v. NLRB*, 159 F.2d 906 (2d Cir. 1952) (“There is nothing in the Act which compels the conclusion that collective-bargaining contracts must be formally attested by the parties; rather Sec. 8(d)—specifically provides for a written agreement ‘if requested by either party’—a clear evidence that writing is not required as a matter of law”).

⁹I note that, similar to the point drawn by the Board in its discussion of the “oral” agreement in *Teamsters Local 294 (Conway’s Express)*, 87 NLRB 972, 976 fn. 9 (1949): “[o]f course, the contract in this case was ‘oral,’ more exactly ‘parole,’ only in a highly technical sense. Save for the missing signature, it was a complete written document, duly publicized to all interested parties at the time of its adoption, and proved by unimpeachable documentary evidence.” In the instant case, the Union’s acceptance of the final offer was oral, but for the very most part the agreement was in writing, in the form of tentative agreements on specific provisions (Exh. 7) and a document describing the YWCA’s final economic offer. (Exh. 8). Most significantly—as will be discussed below—the parties accept that the agreement was not sufficiently written and signed to have constituted a “contract bar” to an election petition had one been filed. So while the agreement reached by the parties was “oral” only in a technical sense, throughout this decision I refer to the agreement reached by the parties for a new collective-bargaining agreement as an “oral” agreement, to be distinguished from the formal collective-bargaining agreement that was being reduced to writing and prepared for execution until the issue of the Union’s loss of majority support derailed that process.

However, the record strongly supports a finding, as asserted by the General Counsel, that the contract was formed twelve days earlier upon the Union's acceptance of the YWCA's contract offer on April 20.¹⁰ That is the date on which the membership ratified Respondent's contract offer, and the date on which that acceptance was conveyed by the Union to Respondent. That is the date on which the YWCA's Attorney Abbott "offered to reduce to writing the final and complete agreed-upon contract for signature." (Stipulated Fact No. 18). There were no further bargaining sessions scheduled or required. Employees were told that they would be voting on the "last and final offer" and the YWCA urged employees to "accept Respondent's final contract offer and ratify the entire contract, or risk facing the uncertainties of a strike." (Stipulated Fact No. 14; Exhs. 9, 10). Clearly, the message to employees was that this was the final step to a complete and binding agreement.

As of April 20, the only matter left for determination was the date of the floating holiday. The YWCA's final offer, accepted by the Union, provided that "the Union, at its sole discretion" designate the date of the holiday, "assuming that the final offer was accepted." (Stipulated Fact No. 12). That there would be an extra holiday was agreed to, and, indeed, touted to employees by the YWCA as one of the "economic improvements in the YWCA's final offer" (Exh. 9) and a reason to vote to accept the contract offer. The agreement to delegate to one party the discretion to choose the holiday was an agreed to term of the final offer, and when the offer was accepted the contract was formed on that basis. It does not reflect a failure of the parties to *mutually* agree on a substantive term and conditions of employment. To the contrary, *the mutual agreement* was that the date was to be unilaterally chosen by the Union, "assuming that the final offer was accepted." (Stipulated Fact No. 12). The parties' intentions were clear. Similarly, on April 20 the Union was still to designate the individuals who were to serve as stewards. These were not missing terms, but mutually agreed to provisions to be carried out upon contract formation. Accordingly, I find that the parties entered into a binding agreement on April 20, 2005.

I would add that the April 20 date is also consistent with the evidence that the parties intended the contract to be effective as of the ratification. The Union's correspondence to employees on April 25 represents that while the Union waits for a final version to be proof read and "sign[ed] off on" that "the contract as agreed upon is in effect." (Exh. 11). On May 12, the Union "notified Respondent that, in accordance with the contractual provision that allows the Union to have five stewards, three employees had been selected and the Union was still making an effort to fill the two remaining slots." (Stipulated Fact No. 24). Also on May 12, Union Representative Scott "left a telephone message for Respondent's Human Resource Coordinator Chatel asking about the status of the draft contract and requesting that she advise management to start applying the terms of the contract. . . . Scott followed-up this telephone message with an e-mail to . . . Chatel." (Stipulated Fact No. 25). Chatel's response (Exh. 13) did not deny that the contract was in effect, but indicated that "since the contract is not complete and neither management nor staff have received a copy, there appears to be some confusion around this issue." By "not complete," Chatel could only mean that the document was not in final written form, as the parties have stipulated that ten days earlier they had "orally reached a complete agreement on all of the terms and conditions of employment of the Unit to be included in a collective bargaining agreement." (Stipulated Fact No. 21). Thus, the "confusion" must have been from the lack of staff and management having copies—a not surprising difficulty while the

¹⁰Respondent does not explicitly propose a date on which a binding agreement was reached. The stipulations state that "full agreement" was reached "no later than May 2."

parties wait for a written version of the contract.¹¹ In the face the Union's assertions to employees and the YWCA that the contract was in effect, the YWCA's failure to deny the Union's position, express a contrary assertion, or even surprise at the Union's position, only adds to the evidence that the contract came into being on April 20.¹²

3. Application of the conclusive presumption of majority support to agreements yet to be executed

Having found that the parties entered into a binding agreement on April 20 brings us to the central legal dispute in this case: the applicability of the conclusive presumption of majority support to agreements that are yet to be executed when a union loses majority support.

Notwithstanding the depth of the division between the parties, they agree on much. For example, no party claims that the employee cards submitted to the YWCA are inadequate to demonstrate an actual loss of majority support by the Union. As of May 8, 50 percent of the bargaining unit had signed such a card and the YWCA became aware of the cards on May 13. There is no allegation that any misconduct by the YWCA is responsible for the employees' loss of support for the Union. The parties do not dispute that an agreement was reached prior to the Union's loss of majority support. In terms of legal issues, the parties agree that once an agreement between an employer and union is executed the conclusive presumption of majority support precludes an employer from withdrawing recognition based on a loss of majority support that occurs after execution. The parties agree that prior to an agreement between a union and employer, the presumption of majority support is rebuttable and that an employer may withdraw recognition from the union based on a showing that the union has lost majority support within the unit.

The dispute is this: the YWCA contends that the conclusive presumption of majority support that exists during the term of a labor agreement is not in effect until an oral agreement is executed. Up to that point, according to the YWCA, the presumption of majority support is

¹¹See *Appalachian Shale Products*, 121 NLRB 1160, 1163 (1955) ("real stability in industrial relations can only be achieved where the contract undertakes to chart with adequate precision the course of the bargaining relationship, and the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems").

¹²Throughout its brief, Respondent accepts that an oral agreement was reached between the parties, at least by May 2. It does, however, repeatedly refer to the agreement as a "tentative agreement." The General Counsel's brief anticipates, and takes issue with this characterization. It is a noteworthy characterization. In collective-bargaining parlance, a "tentative agreement" refers to an agreement that (1) has been accepted by the parties subject to ratification or other approval mechanism or (2) is an agreement on a particular issue that is subject to becoming binding if and when the parties reach agreement on all other issues. Neither describes the "complete agreement on all of the terms and conditions of employment of the Unit to be included in a collective bargaining agreement" (save for the holiday designation) that existed after ratification of the YWCA's final offer. Prior to its ratification, the agreement could appropriately be called "tentative." And during the some 15 months of bargaining that preceded the agreement the parties entered into numerous "tentative agreements" (Exh. 7) on many specific issues. However, there was nothing "tentative" about the agreement reached on April 20.

rebuttable, just as it is rebuttable before formation of the oral agreement, based on an employer's showing that the union has lost majority support in the bargaining unit. Indeed, according to the YWCA, an employer presented with evidence of the union's loss of majority support not only may, but must withdraw recognition and refuse to execute the oral agreement. The General Counsel and the Union, for their part, contend that the conclusive presumption of majority support attaches with the formation of the contract, without regard to the written status of the document.

Specifically, the YWCA contends that the demonstrated lack of majority support for union representation that it became aware of on May 13, relieved it of the obligation—indeed, precluded it—from executing or adhering to the agreement previously reached with the Union, or from continuing to recognize the Union as the employees' collective-bargaining representative.

The YWCA would place this case within the ambit of Section 8(a)(2) cases that forbid “negotiating, executing and implementing” (YWCA Br. at 11) a contract with a “minority union.” See *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961) (holding that recognizing and reaching agreement with minority union is unlawful). But the cases the YWCA relies upon are inapposite, as they involve employers executing agreements where the union had lost majority support *prior* to contract formation, during (or even before) negotiations for a new contract.¹³

Cases that involve a union's loss of majority support *prior* to contract formation moot issues regarding the competence of the union to contract as a majority union that are simply not at issue here. See, e.g., *Chicago Tribune Co. v. NLRB*, 965 F.2d 244, 250 (7th Cir. 1992) (“As for the Board's rule that a union's unconditional acceptance of an offer for a collective-bargaining contract is valid and binds the company unless circumstances have changed since the company's offer was made or renewed, we do not think the rule should apply to a case such as this where between the original offer and its renewal the union lost the support of the workers. . . . Here the union had lost majority support long before it accepted the company's offer”), denying enforcement of *Chicago Tribune*, 303 NLRB 682 (1991); see also, *Four Flags Motors*, 1997 WL 852914 (N.L.R.B.G.C.) (a case cited by Respondent in which the General Counsel's Division of Advice recommended dismissal of a Section 8(a)(5) charge because, assuming the union lost majority support prior to accepting the bargaining offer, the employer was privileged to withdraw recognition).

Even cases involving only employer “doubt” of a union's majority support—where the doubt is based on events known to the employer before the union accepts the bargaining

¹³The YWCA points particularly to cases that cite the “execution” of an agreement with a minority union as violative of the Act. See, e.g., *Dura Art Stone*, 346 NLRB No. 14 (2005); *Point Blank Body Armor, Inc.*, 312 NLRB 1097 (1993); *Presbyterian Community Hospital*, 230 NLRB 599 (1977); *Pepsi Cola Bottling Co.*, 187 NLRB 15 (1971), *enfd.* 454 F.2d 5 (6th Cir. 1972); and *Hart Motor Express*, 164 NLRB 382 (1967); *Kenrich Petrochemicals, Inc.*, 149 NLRB 910 (1964). In each of these cases the contract was negotiated and agreed to while the union represented a minority of the unit, so the execution was unlawful. These cases simply do not treat with the issue at hand: whether an employer may (or must, to avoid an 8(a)(2) violation) refuse to execute a contract already agreed to with a union that became a minority union *after* agreeing to the contract.

agreement—brush up against the 8(a)(2) issue in a way that is not presented by the instant case. Thus, in *Auciello*, where the Board concluded that an employer cannot refuse to execute an agreed-upon bargaining contract based on good-faith doubt that arose before the union accepted the offer, it was careful to distinguish its holding from those cases where an actual loss of majority support occurred prior to contract acceptance. See, e.g., *Auciello Iron Works, Inc.*, 317 NLRB 364, 370–371 (1995), *enfd.* 60 F.3d 24 (1st Cir. 1995), *affd.* 517 U.S. 781 (1996).

Here, these concerns are not present. There is no evidence that the Union was anything but a majority union when it accepted the YWCA's offer. Respondent entered into a binding agreement with the Union before the Union lost majority support. Section 8(a)(2) is not offended.

The stipulated evidence is clear: there was no loss of majority support until *after* formation of the contract. Contrary to the position of the YWCA—which contends *without authority* that it is not the formation of the contract but its execution that is the relevant moment when the incumbent union's presumption of majority support becomes conclusive—I think the law is clear that once a contract is formed, an employer may not rely on a union's subsequent loss of support to justify withdrawal of recognition, or refusal to execute the contract.

It is not just that the Supreme Court has recognized (in passing to be sure) that typically a “conclusive presumption [of a union's majority support] aris[es] at the moment a collective bargaining contract offer has been accepted.” *Auciello Iron Works v. NLRB*, 517 U.S. at 791 (1996). But a series of on-point Board cases confirm it. *Flying Dutchman Park, Inc.*, 329 NLRB 414, 417 (1999) (“When an employer asserts a good-faith doubt about an incumbent union's continued majority status based on events—including the filing of a decertification petition—occurring after final agreement on the substantive terms of a collective bargaining agreement, an employer may not lawfully refuse to bargain. This is true regardless of the status of any written instrument incorporating such agreement”) [footnote omitted]; *Auciello Iron Works*, 317 NLRB at 368 (“We affirm the rule set forth in *North Bros. Ford*, that a union's acceptance of an employer's outstanding contract offer precludes the employer from raising a good-faith doubt of the union's majority status based on events occurring *after* acceptance. Thus, the employer's good-faith doubt based on subsequent events is not available to defend a refusal to execute a valid agreement or a withdrawal of recognition”) [emphasis in original]; *Belcon, Inc.*, 257 NLRB 1341 (1981) (“Having found there was a valid agreement in existence between the parties on November 29, I do not deem it necessary to treat the Respondent's claim that it had a [subsequent] good-faith doubt based on objective considerations regarding the Union's majority status”); *North Bros. Ford, Inc.*, 220 NLRB 1021 (1975) (“Final agreement was reached no later than October 14, 1974, well before the decertification petition was filed. Once final agreement on the substantive terms was reached, and regardless of the status of any written instrument incorporating that agreement, the Respondent was not free to refuse to bargain even if then has lawful grounds for believing that Local 376 had subsequently lost its majority status”) [footnote omitted]; *Utility Tree Service*, 215 NLRB 806 (1974) (employer violated the Act by refusing to sign and execute agreement where union accepted final offer after ratification and 2 days later employer received cards from a majority of employees indicating they did not want union representation: “we find that on March 9 the parties had consummated a valid contract to which the Respondent was bound, and the Respondent was made aware of that fact on the same day. Thus, subsequent actions by IBEW members or issues raised by the Respondent regarding its good-faith doubt as to whether the IBEW thereafter represented a majority of employees in the appropriate unit are irrelevant”), motion to reopen record denied, 218 NLRB 784 (1975) (later

actions or issues “irrelevant and immaterial since on March 9, when the agreement was consummated, Respondent had no basis for questioning the Union's majority”), enfd. 539 F.2d 718 (9th Cir. 1976); *East Texas Steel Castings Co.*, 191 NLRB 113 fn. 4 (1971) (“Respondent's alleged doubt of the Union's majority is immaterial since at the time agreement was consummated, the Respondent, by its own assertion, had no basis for questioning the Union's majority”).

The YWCA contends that the present case is beyond the reach of this seemingly dispositive case law because the above-cited cases reference the irrelevance of post-agreement “*doubt*” of majority support and not, as can be shown here, of an *actual* loss of majority support by the union.

I think that argument misses the point of these cases. This is not a significant distinction for purposes of understanding whether an employer can withdraw recognition based on a union's loss of majority support that occurs *after* a contract has been formed.¹⁴

Of course, the YWCA points to the Board's statement in *Auciello* that “there is a significant distinction between a case involving a claim of actual loss of majority support and one involving a claim of good-faith doubt.” The Board in *Auciello* emphasized that it limited its holding to instances involving an employer's “good-faith” doubt of the union's majority status. *Auciello Iron Works*, 317 NLRB at 365 fn. 14. However, to apply this observation to the instant case is truly to apply it out of context. As referenced, *supra*, *Auciello* involved a situation where the good-faith doubt of the union's majority support was based on events that occurred *prior* to the union's acceptance of the contract, albeit the employer did not assert its pre-contract doubt until after the union accepted the contract offer. The Board in *Auciello* held (in a decision enforced by the First Circuit and affirmed by the Supreme Court), that where an employer has a good-faith doubt of the union's majority support *before* the union accepts an outstanding

¹⁴The distinction is rooted in the standards the Board has required of employers to rebut the presumption of majority support accorded to incumbent unions, and, therefore, to justify an employer's withdrawal of recognition. Until its decision in *Levitz Furniture Co.*, 333 NLRB 717 (2001), the Board had long held that an employer could rebut the presumption of majority support, and lawfully withdraw recognition, by showing either that a union had actually lost the support of a majority of the bargaining unit employees, or that based on objective considerations, it had a “good-faith doubt” of the union's continued majority status. In *Levitz*, the Board held that, henceforth, an employer could not unilaterally withdraw recognition based on a good-faith doubt of the union's majority support, but could take that unilateral action “only where the union has actually lost the support of the majority of the bargaining unit employees.” *Levitz*, *supra* at 717. Of course, both before and after *Levitz*, meeting these standards rebutted the presumption of majority support only during times when the presumption was rebuttable; these standards did not justify withdrawal of recognition during times—such as “while a collective bargaining agreement is in effect”—when the presumption was not subject to challenge. *Levitz*, *supra* at 730 fn. 70 (“[a]n employer may not lawfully withdraw recognition while a collective bargaining agreement is in effect, because an incumbent union enjoys a conclusive presumption of majority status during the life of the contract (up to 3 years)”).

In *Levitz*, the Board altered the means available to an employer to rebut a presumption of majority support for a union during times that the presumption is rebuttable. It did not purport to alter the circumstances in which that presumption was conclusive and not subject to rebuttal.

contract offer, but fails to assert that good-faith doubt until just *after* acceptance of the contract offer, the employer is precluded from withdrawing recognition during the term of the contract.

The Board in *Auciello* was clear that it was not deciding whether a showing that the union suffered *an actual loss* of majority support *prior* to entering into the contract—even if unasserted until after the contract was formed—similarly precluded the employer from refusing to bargain with the union. As discussed, *supra*, the latter scenario raises the specter of 8(a)(2) concerns that the contract was the product of an agreement between an employer and a minority union not competent to enter into the contract, having actually lost majority support prior to the formation of the contract.

That the distinction is a significant one in the context of precontract issues of majority support (the case in *Auciello*) does not offer the slightest support for a claim that the distinction is relevant for questions regarding a union's loss of majority support (whether the loss is a certainty or an uncertainty) that occurs only *after* contract formation, which is the situation presented by the instant case. Here, where no evidence shows a loss of majority support for the Union at the time the Union accepted the contract, none of the issues regarding the competence of a minority union to accept a contract are mooted. After a union and an employer enter into a binding contract, whether an employer subsequently develops a good-faith doubt of, or can show an actual loss of, a union's majority support is an irrelevancy, as a "conclusive presumption [of a union's majority support] arises at the moment a collective bargaining contract offer has been accepted." *Auciello*, *supra* 517 U.S. at 791. That this means, as the YWCA stresses, that an employer will be executing a contract with a union that has (since entering into the contract) become a minority union, is of no more consequence than the fact, accepted by the YWCA, that where majority support erodes days (or the day) after signing of a contract the employer must nonetheless deal with the union until the expiration of the labor agreement. Whether or not the union actually has lost (or will lose) majority support since the contract came into being matters not, because, "[a]s the Supreme Court in *Fall River* noted, the Board bases its presumptions of majority status not on absolute certainty that the union's majority status will not erode following certification [or acceptance of a contract], but rather on carefully considered policy choices intended to further the Act's objectives." *Auciello*, 317 NLRB at 367 (referencing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987)).

Notably, although the YWCA is correct that the Board cases rejecting employer efforts to withdraw recognition after acceptance of a contract talk in terms of "doubt" regarding loss of majority support, the case that is most similar to the instant case—indeed its facts are essentially indistinguishable—involves a showing of an actual loss of majority support. In *Utility Services*, *supra*, the IBEW membership ratified the employer's offer on March 9 and on that date the union so advised the employer. According to the facts stipulated to by the parties, on March 11 and 12 the employer received signed statements from a majority of its bargaining unit employees stating that they no longer wished to be represented by the IBEW. On March 14, the employer advised the IBEW that it would not sign the ratified agreement. The union filed charges and the Board found "[c]ontrary to the contentions of the Respondent" that

on March 9 the parties had consummated a valid contract to which the Respondent was bound, and the Respondent was made aware of that fact on the same day. Thus, subsequent actions by IBEW members or issues raised by the Respondent regarding its good-faith doubt as to whether the IBEW thereafter represented a majority of employees in the appropriate unit are irrelevant. Accordingly we find that on March 9 a final and binding collective-bargaining

agreement was consummated between the Respondent and the IBEW, and that the Respondent had been duly notified. At that point the Respondent had a legal obligation to sign and execute the contract. The respondent's alleged doubt of the IBEW's majority on March 12 was immaterial since on March 9 it had no basis for questioning the IBEW's majority. The refusal of the Respondent to execute the contract, therefore, violated Section 8(a)(1) and (5) of the Act.¹⁵

The YWCA would ascribe the outcome in this case to an employer that defended on the wrong theory by neglecting to point out that the union had actually lost majority support. But there is not the slightest basis for the suggestion that in this or any of the other cases that had the employer framed its withdrawal of recognition as being based on the union's actual loss of majority support, and not on doubt as to union's majority support, it would have made a difference to the analysis or outcome. As in the instant case, the employer in *Utility Services* was holding statements from a majority of bargaining unit employees declaring that they no longer wanted union representation. But under the circumstances this evidence was irrelevant—not because of the level of certainty on the employers' part—but because the unions and employer “had consummated a valid contract to which the Respondent was bound” and [t]hus, subsequent actions by [union] members or issue raised by the Respondent” regarding the union's majority support “are irrelevant.” Whether based on “doubt” of or actual loss of majority support, a unilateral withdrawal after formation of a valid contract violates the Act.¹⁶

4. The relationship of the Board's *Appalachian Shale* rule to this case

The YWCA's position draws heavily on its view of the proper relationship between an employer's ability to unilaterally withdraw recognition from an incumbent union and the Board's rules governing when a contract bars an election seeking to oust an incumbent union. The discussion is incomplete without consideration of this aspect of Respondent's argument.

¹⁵215 NLRB at 807.

¹⁶One can surmise that the reason so many cases speak of “good-faith doubt” and not “actual loss” of majority support, is that because from 1951 when the Board issued *Celanese Corp. of America*, 95 NLRB 664, to the issuance of *Levitz*, supra, in 2001, in circumstances where the presumption of support was rebuttable both the “good-faith doubt” and “actual loss” standards provided a basis for the same employer action: unilateral withdrawal of recognition (see fn. 14, supra). Given that both standards entitled the employer to take the same action employers did not need to assert the more demanding “actual loss” of majority standard as a “good-faith doubt” was adequate to justify unilateral withdrawal of recognition. There is nothing in *Levitz* to suggest that the Board's jettisoning of one option for unilateral action prior to reaching a valid contract (the “good-faith doubt” option) transformed the remaining option (a showing that the union has actually lost majority support) into one that may be utilized after reaching a valid oral contract.

The Board's contract bar doctrine is an administrative device adopted by the Board that provides generally that an extant labor agreement bars the processing of an election petition.¹⁷ However, a longstanding exception to the Board's contract bar doctrine provides that a labor agreement between an employer and union that is yet to be reduced to writing and signed does not bar the filing of an election petition seeking to displace an incumbent union. The bar is imposed and the filing and processing of an election petition precluded only by a written and signed contract. *Appalachian Shale Products, Co.* 121 NLRB 1160 (1958).¹⁸

The YWCA's contention starts from the observation—undisputed by any party to this litigation—that the parties' agreement was not sufficient under *Appalachian Shale* to bar an election petition. Thus, even after the Union's oral acceptance of the YWCA's offer, employees or a rival union could have filed and the Board would have processed a petition seeking to oust

¹⁷In *Direct Press Modern Litho, Inc.*, 328 NLRB 860, 860–861 (1999), the Board described its contract bar doctrine in the following terms:

Thus, in general, the [contract bar] doctrine's dual rationale is to permit the employer, the employees' chosen collective-bargaining representative, and the employees a reasonable, uninterrupted period of collective-bargaining stability, while also permitting the employees, at reasonable times, to change their bargaining representative, if that is their desire. It is worth noting that the contract-bar doctrine is not compelled by the Act or by judicial decision there under. It is an administrative device early adopted by the Board in the exercise of its discretion as a means of maintaining stability of collective bargaining relationships. The Board has discretion to apply a contract bar or waive its application consistent with the facts of a given case, guided overall by our interest in stability and fairness in collective-bargaining agreements [citations omitted].

¹⁸*Appalachian Shale Products* is often cited as the lead case for this proposition, although this exception to the Board's contract bar doctrine dates back to the 1940s. While oral contracts have always been binding on the parties to them (see fn. 7, *supra*), the Board has long "decline[d] to treat oral agreements as a sufficient basis for denying or postponing the statutory right of employees to change or discharge their bargaining representatives." *Teamsters Local 294 (Conway's Express)*, 87 NLRB 972 (1949), *enfd.* 195 F.2d 906 (2d Cir. 1952); *Eicor, Inc.*, 46 NLRB 1035, 1937 (1943) ("a collective-bargaining agreement which has not been reduced to writing and signed does not constitute a bar to a determination of representatives"). This included contracts that were not yet signed before the filing of an election petition although for a time the Board's rule was that contracts signed after the filing of an election petition constituted a bar where the agreement and acceptance were in written form, the parties considered the agreement concluded and put into immediate effect certain important provisions, and the agreement was signed within a reasonable time after agreement had been reached. *Oswego Falls, Corp.*, 110 NLRB 621 (1954). This wrinkle was eliminated when the Board overruled *Oswego Falls* in *Appalachian Shale Products* and accepted the bright line rule that "a contract to constitute a bar must be signed by all the parties before a petition is filed and that unless a contract signed by all the parties precedes a petition, it will not bar a petition even though the parties consider it properly concluded and put into effect some or all of its provisions." 121 NLRB at 1162. The holding of *Appalachian Shale* has prevailed since 1958. Thus, parties that conclude an agreement that is still to be written and signed run the risk that a decertification or rival representation petition will be filed and processed.

the incumbent union.¹⁹ Respondent argues that to treat employer withdrawals of recognition and election petitions differently is without justification. In other words, if one method (election petitions) of expressing employee lack of support for an incumbent union is available, all others (specifically, employer withdrawal of recognition based on a loss of employee support for the union) must be as well. According to the YWCA, “[p]olicy, precedent and logic compel the conclusion” that “just as the loss of majority support *after* verbal acceptance of contract provisions does not preclude a decertification petition, the fact that the loss of support comes after contract acceptance does not preclude a majority of employees from asking its employer to withdraw recognition based on an actual loss of support.” (R. Br. at 17, 19) (original emphasis).

I do not agree. While the Board's doctrine of an irrebuttable presumption of majority support during the contract term is based on the Board's contract bar doctrine—which unlike the presumption of majority support principle was developed in the representation context—it is not the same doctrine. Certainly, both doctrines are motivated by the same policy, often overlap and result in the same outcome, and at times are both aptly described as “contract bar” rules, but they are, in fact, not identical doctrines and do not need to be—and are not—identically applied. The significant overlap has, at times, led the Board and some courts to describe the doctrines interchangeably, but there are differences.²⁰

¹⁹It is clear that pursuant to the *Appalachian Shale* rule, employees and rival unions may file an election petition notwithstanding an employer and incumbent union's oral contract. Whether an employer party to an oral contract may file an election petition (an RM petition) is not presented by this litigation and I do not reach that issue. I note that the General Counsel's published position is that such a petition is barred. *NLRB Outline of Law and Procedure in Representation Cases*, Chapter 7-220, RM Petitions/Incumbent Unions (July 2005) (available on the Agency's website at www.nlr.gov) (“Once an incumbent union has accepted a contract offer, the employer cannot challenge its majority status by filing an RM petition even though a RD or rival RC petition could be filed assuming acceptance would not otherwise be precluded by the Board's contract bar standards”). Notably, the Board has refused to interpret its contract bar rules to allow contracting parties “to avoid their contractual obligations and commitments through the device of a petition to the Board for an election.” *Montgomery Ward & Co.*, 137 NLRB 346, 348–349 (1962) (holding that 5-year agreement barred employer's RM petition, even though agreement's term exceeded 3-year maximum permitted by the Board's contract bar doctrine and therefore employees and outside unions were not barred from filing a petition).

²⁰In *Auciello*, supra at 367 fn. 26, the Board emphasized the analytical distinction: The First Circuit in remanding the present cases stated that the Board's decisions regarding the availability of the good-faith doubt defense after the parties have reached a binding agreement are based on the contract bar rule. Under that rule, a contract meeting certain requirements is valid and will bar an election. See generally *Hexton Furniture Co.*, 111 NLRB 342 (1955). Although the Board has on occasion framed its discussion of a union's continuing majority support during the term of a contract in terms of the contract bar rules (see, e.g., *Westwood Import Co.*, 251 NLRB 1213, 1213–1214 (1980), enfd. 681 F.2d 664 (9th Cir. 1982)), we emphasize that the precise rule of law applicable here is the irrebuttable presumption that a union retains majority status during the contract term. We note, however, that the same policy underlies both the presumptions of majority status and the contract bar rules: achieving a reasonable balance between industrial stability and employee freedom of choice.

For instance, a well-settled exception to the contract bar doctrine is the “open period” in the 60-90 days prior to contract expiration during which election petitions can be filed and processed notwithstanding the extant contract. *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000 (1962). However, it is equally well-settled that there is no similar open period for an employer seeking to withdraw recognition from a union that has lost majority support during the term of the contract. The employer violates Section 8(a)(5) if it withdraws recognition prior to contract expiration no matter the extent or certainty of the loss of support for the Union. *Burger Pits, Inc.*, 273 NLRB 1001, 1002 (1984) (“while the contract was in effect the Respondent was not privileged to withdraw recognition from the Union or unilaterally to implement contractual changes”), *enfd.* 785 F.2d 796 (9th Cir. 1986). Thus, while the contract bar doctrine permits the filing of election petitions 60-90 days before contract expiration, during this period the employer is “barred” from withdrawing recognition by the conclusive presumption of majority support.

But the most pertinent example is that at issue here: not only is it clear that an employer’s ability to engage in unilateral withdrawal of recognition has long been “barred” by “the conclusive presumption [of a union’s majority support] arising at the moment a collective bargaining contract offer has been accepted” (*Auciello*, 517 U.S. at 791 and cases cited at 13-14, *supra*), but some of the very cases demonstrating this proposition also involve the filing of an election petition because the new agreement had not been reduced to writing and signed.

For example, in *North Bros.*, *supra*, the Board’s holding that questioning of the presumption of majority was precluded “[o]nce final agreement on the substantive terms was reached, and regardless of the status of any written instrument incorporating that agreement,” included express rejection of the employer’s contention “that the filing of the decertification petition [after the parties reached oral agreement] . . . barred it from executing any contract or bargaining with Local 376 while the petition was outstanding.” 220 NLRB at 1022 [footnote omitted]. Even more pointedly, in *Flying Dutchman Park*, 329 NLRB at 417, the Board held that

[w]hen an employer asserts a good-faith doubt about an incumbent union’s continued majority status based on events—including the filing of a decertification petition—occurring after final agreement on the substantive terms of a collective bargaining agreement, an employer may not lawfully refuse to bargain. This is true regardless of the status of any written instrument incorporating such agreement.

Thus, the ability to file an election petition at the same time that an oral agreement bars unilateral employer withdrawal of recognition has not gone unnoticed by the Board. The case law demonstrates that from the moment an employer and a union reach agreement on terms and conditions of employment the employer is barred from rebutting the presumption of majority support, notwithstanding that an election petition may still be filed until the agreement is reduced to writing and signed. Indeed, even the actual filing of an election petition has no impact on the employer’s inability to withdraw recognition based on doubts of a union’s majority support developing *after* the union has accepted a contract offer. Precedent does not support the YWCA’s position.

Moreover, the interaction of these different “contract bar” rules is consonant with Board policy. As the Board explained in *Auciello*, “with respect to *employers* [] permissible methods of self-help to select and reject bargaining agents—in this case assertion of a good-faith doubt and attempted withdrawal of recognition—must be carefully circumscribed to prevent stable labor relations from being undermined by total employer control.” 317 NLRB at 374 [Board’s

emphasis]. While “[t]he Board and the courts have consistently said that Board elections are the preferred method of testing employees’ support for unions” (*Levitz Furniture Co.*, supra, 333 NLRB at 727), unilateral employer severance of a bargaining obligation is disfavored. Indeed, in *Levitz*, the Board took the step of requiring a lower evidentiary burden for an employer to file an RM petition than for an employer to withdraw recognition of a union, precisely because “we think that processing RM petitions on a lower showing of good-faith uncertainty will provide a more attractive alternative to unilateral action” (333 NLRB at 727) and will “reduc[e] the temptation to act unilaterally.” Id. at 725.

Thus, Board policy disfavors employer unilateral withdrawal of recognition even compared to employer election petitions. Compared to employee election petitions, Board policy is equally, if not more, willing to circumscribe unilateral employer action. “It is well to bear in mind, after all, that it is the *employees’* Section 7 right to choose their bargaining representatives that is at issue here. Strictly speaking, employers’ only statutory interest is in ensuring that they do not violate Section 8(a)(2) by recognizing minority unions.” *Levitz*, 333 NLRB at 728 [Board’s emphasis]. In the instant case, as discussed supra, there is no possibility that the YWCA violated 8(a)(2) by entering into agreement with the Union, which by all evidence maintained majority support at the time of contract formation. Thus, the *only* statutory interest implicated by YWCA’s right to unilaterally withdraw recognition after forming an oral contract is the employees’ right of free choice. It is well-settled that “[e]mployers’ invocation of employee free choice as a rationale for withdrawing recognition has, with good reason met with skepticism.” *Levitz*, 333 NLRB at 724 fn. 45.²¹ Or as the Seventh Circuit has put it: “the company is not its workers’ good uncle.” *Chicago Tribune*, supra, 965 F.2d at 249. Less colorfully, the Supreme Court in *Brooks v. NLRB*, 348 U.S. 96, 103 (1954) explained the policy rationale for this skepticism:

The underlying purpose of this statute is industrial peace. To allow employers to rely on employees’ rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence.

The Court’s admonition in *Brooks* is all the more compelling here. In *Brooks*, the loss of majority support occurred one week after a representation election. By statute, employees would have to wait 51 more weeks in order to utilize the Board’s election procedures and act on their desire to decertify the union. 29 U.S.C. § 159(c)(3) (“No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held”). By contrast, here, there was no bar to an immediate election had the employees sought one at the time that the YWCA withdrew recognition. Thus, in this case the YWCA’s effort to vindicate employee rights was not only, as stated in *Brooks*, “inimical”

²¹In *Levitz*, 333 NLRB at 724 fn. 45, the Board went on to cite the Supreme Court: As the Supreme Court observed in *Auciello Iron Works v. NLRB*, “The Board is accordingly entitled to suspicion when faced with an employer’s benevolence as its workers’ champion against their certified union, which is subject to a decertification petition from the workers if they want to file one. There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees’ organizational freedom” [citations omitted].

to the Act's underlying purpose of industrial peace, but also unnecessary for immediate vindication of the Act's goal of allowing the exercise of employee free choice.

Rules that preclude an employer from unilaterally severing the bargaining relationship after entering into an oral agreement, while still permitting employees to act through a Board election to exercise free choice, are obviously consistent with the Board's disfavoring of employer withdrawal of recognition, ostensibly exercised on behalf of employees.

Notably, the Board's policy disfavoring unilateral withdrawal of recognition also accounts for the fact that under Board precedent there is (in most circumstances) no opportunity for an employer to rebut the union's presumption of majority support at a time that election petitions are subject to the contract bar. The Board has reasoned that

"for the period during which the contract was a bar and no question concerning representation might validly be raised, the Respondent was under an obligation to recognize and bargain with the Union." Otherwise, we should have the anomalous result of an employer being permitted unilaterally to redetermine his employees' bargaining representative at a time when the Board would refuse to make such redetermination because the time is inappropriate for such action. Accordingly, by withdrawing recognition from the Union during the middle of the contract term, the Respondent unlawfully refused to bargain with the Union.

Hexton Furniture Co., 111 NLRB 342, 344 (1955) (quoting, *Sanson Hosiery Mills, Inc.*, 92 NLRB 1102, 1103 (1950), *enfd.* 195 F.2d 250 (5th Cir.), *cert. denied* 344 U.S. 863 (1952)).

This obviously accords with the Board's stated disfavor for the more disruptive unilateral action of employer withdrawal of recognition. It also explains why some cases Respondent cites rely upon the fact that a decertification petition would be barred by a contract as proof that an employer cannot unilaterally withdraw recognition. Thus, in *NLRB v. Marine Optical, Inc.*, 671 F.2d 11, 16 (1st Cir. 1982), cited by Respondent, the Court explained that

since an employer may not petition for decertification during this contract-bar period, it follows that he may not repudiate the contract or withdraw recognition from and refuse to bargain with the Union during the term of the collective bargaining agreement. A contrary rule would permit an employer to do on its own what would have been forbidden had it petitioned the Board, i.e. question the majority status of the Union. Thus, during the period a valid collective bargaining agreement is in effect, the Union, absent unusual circumstances not present here, enjoys a conclusive presumption of majority status. [citations omitted].

See also, *Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 838-839 (9th Cir. 1978) ("although the Company does not seek a decertification election, it seeks the same result by professing a doubt of majority status and refusing to adhere to the contract terms. The Board correctly

contends that while the [contract bar] rule applies, the employer must adhere to the terms of the contract”).²²

Thus, the significant overlap between the doctrines is not without reason, but does not advance Respondent’s case here. For reasons rooted in Board policy—i.e., denying employers the opportunity to unilaterally oust an incumbent union at a time that an election petition is barred—the existence of an election petition contract bar demonstrates (absent unusual circumstances), *a priori*, that a unilateral employer withdrawal of recognition is also prohibited. However, it does not follow, as Respondent asserts, that that whenever an election petition may be filed an employer is also free to unilaterally withdraw recognition.

The contract bar doctrine and irrebuttable presumption of majority support do overlap, and both often operate as contract bars, but they are not identically applied. An exception to the contract bar doctrine permitting election petitions at a time that the irrebuttable presumption of majority support bars unilateral withdrawal of recognition is consistent with Board policy²³

Finally, the Board’s rationale for not applying a contract bar to oral agreements does not apply to unilateral employer withdrawal of recognition after entering into an oral agreement.

In 1949, in *Teamsters Local 294 (Conway’s Express)*, 87 NLRB 972, 975 (1949), the Board rejected the General Counsel’s contention that oral agreements were not binding on the

²²Similarly, in *Plymouth Court*, 341 NLRB 363 (2004), a case which Respondent cites, the administrative law judge not only found that “[a] valid contract came into existence as soon as the tentative contract was executed by the parties and ratified by the Union on December 27, 2002,” but also found that this agreement was formalized and signed sufficient to meet the *Appalachian Shale* contract bar requirements *prior* to the employer’s unilateral withdrawal of recognition in March 2003. The latter finding effectively rules out the employer’s withdrawal but does not prove that, had the *Appalachian Shale* requirements not been met, that the employer could have withdrawn recognition.

Although I do not believe that the judge’s analysis in *Plymouth Court* helps Respondent’s case, I note that, in any event, the judge’s analysis on these points was not the subject of exceptions. 341 NLRB 363 at fn. 1. It is well settled that the Board’s adoption of a portion of a judge’s decision to which no exceptions are filed is not precedent for any other case. *ESI, Inc.*, 296 NLRB 1319 fn. 3 (1989); *Anniston Yarn Mills*, 103 NLRB 1495 (1953).

²³It is not only the *Appalachian Shale* doctrine that can be relied upon to remove an incumbent union (or test its support) during a period that there is a conclusive presumption of majority support. In certain circumstances other Board doctrines can trump the conclusive presumption of majority support and allow the employer to withdraw recognition even during the term of a contract. See *Nott Co.*, 345 NLRB No. 23 (2005) (applying accretion analysis to permit midterm withdrawal of recognition where purchase of business resulted in addition of large group of unrepresented employees into unit). This goes to show that given the range of Board doctrines in play at any given time, the conclusive presumption of majority support is not a guarantee in every circumstance that an incumbent union cannot be challenged during the term of the agreement. By the same token, the fact that election petitions can be filed and processed during the term of an (unsigned and/or unwritten) agreement does not show that the irrebuttable presumption of majority support doctrine is not otherwise in effect.

parties, calling it “beside the point that, in representation cases, we decline to treat oral agreements as a sufficient basis for denying or postponing the statutory right of employees to change or discharge their bargaining representatives.” The Board explained:

The principal basis of the Board's rule that an unwritten or unsigned agreement may not operate to bar a petition under Section 9(c) of the Act is that such agreement do not adequately stabilize industrial relations, and therefore do not satisfy the statutory policy which underlies the contract-bar rule itself.

In addition, the rule [] operates as a safeguard against false proof in a situation where the two parties to the alleged contract are likely to have a strong mutual interest in defeating the petition, and hence be tempted to offer collusive evidence of the existence of an oral agreement between themselves. In the present case, however, there is no such danger of collusive evidence as to the existence of the agreement, for the interests of the contracting parties are opposed.

These two rationales for the not applying the contract bar doctrine are not applicable in the context of an employer that has recently agreed on terms and conditions with a union and then seeks to withdraw recognition. The stabilization of industrial relations provided by written and signed agreements is encouraged by a rule that leaves oral agreements at risk to a decertification or rival union's election petition. This encourages parties to write and sign their oral agreements so as to activate a contract bar and thereby protect their agreement from an election petition. But protecting the right of one of the parties to the agreement—i.e., the *employer's* right to withdraw from an agreement it has just made does not encourage, and in cases will discourage, the transition from oral to written agreements. There is no allegation or evidence that the YWCA delayed the process of writing and signing the agreement but a rule that permits an employer to unilaterally withdraw from an agreement until it is signed obviously can encourage such delay. That is the opposite of the Board's intent in adopting the oral contract exception to the contract bar rule.

The second rationale set forth in *Teamsters Local 294*, for not applying the contract bar doctrine to oral agreements is particularly inapplicable to employers who are parties to an oral agreement. The evidentiary clarity provided by written and signed contract enables employees and rival unions to know without doubt when a contract bar is, in fact, in place. To bar election petitions based on an oral contract—the details and even existence of which may only be known to the employer and union entering into it—would provide great incentive for “collusive evidence” on the part an employer and union that wished to maintain the contract against a non-supportive majority of employees or rival unions. However, as the Board also pointed out in *Teamsters*, this risk is not an issue when the interests of the contracting parties are opposed. That is the case when the contracting employer seeks to void the agreement and withdraw recognition from the incumbent/contracting union.

In sum, there is precedent, as well as policy and logic behind a doctrine that precludes an employer from withdrawing recognition from a union that loses majority support *after* entering into an agreement with the employer. That employees retain the ability to reject the union until that agreement is signed and written has been a part of Board procedure for many years. That an employer that has just reached an agreement with a union is more limited—than employees—in its ability to vindicate employee rights represents an appropriate balancing of the goals of employee free choice and bargaining stability.

V. Conclusions of Law

1. Respondent Young Woman's Christian Association of Western Massachusetts is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Charging Party International Union, United Automobile, Aerospace & Agricultural Workers of America, Local 2322, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. Charging Party, at all times since October 27, 2003, has been the exclusive collective-bargaining representative, based on Section 9(a) of the Act, of an appropriate unit for such purposes as defined by Section 9(b) of the Act, of Respondent's employees, composed of:

All full-time and regular part-time employees employed by Respondent at its facilities located in Hampden and Hampshire counties including direct service advocates, service coordinators/case managers, hotline counselors, community educators, father's and youth outreach workers, program cook, housing advocates, construction managers, construction trainer, coordinator of operations, and youth development, education coordinator, teacher, counselor/case manager, rape crisis counselor, program coordinator, site coordinators, staff associates, safeplan advocates, mentor coordinators, counselor/volunteer coordinator, and youth development program coordinator, but excluding all office clerical employees, managerial employees, professional employees, confidential employees, casual employees, all relief staff, building maintenance, custodians, guards, site/program directors, and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing since May 19, 2005, to reduce to writing and sign the collective-bargaining agreement reached with the Union and ratified by the employees on April 20, 2005.
5. Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the bargaining unit described above in paragraph 3, on May 19, 2005, and failing and refusing to recognize the Union at all times thereafter:
6. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

VI. Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent YWCA must forthwith reduce to writing and sign the agreement reached with the Union and ratified by employees on April 20, giving effect to its terms retroactive to April 20, 2005.

Respondent YWCA shall recognize, and upon request of the Union, bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit employees.

Respondent YWCA shall make whole its employees for losses, if any, which they may have suffered as a result of Respondent's failure to sign and honor the collective-bargaining agreement in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). This includes making whole their employees by making all unpaid fringe benefit fund contribution payments (if any) to the extent provided for by the collective bargaining agreement and by reimbursing employees for any expenses ensuing from the Respondents' failure to make such contribution payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Respondent shall reimburse the Union, with interest, for lost dues that would have been remitted to the Union but for Respondent's failure and refusal to honor the collective-bargaining agreement reached with the Union, such sums calculated in the manner set forth in *Ogle Protection Service*, supra. Interest on all sums shall be computed as prescribed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall post an appropriate informational notice, as described in Appendix A, attached. This notice shall be posted in Respondent's facility or wherever notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 1 what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

The Respondent, YWCA of Western Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from:
 - a. failing and refusing to reduce to writing and sign the collective-bargaining agreement reached with the Union and ratified by employees on April 20, 2005; and
 - b. failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative for the following bargaining unit of its employees:

All full-time and regular part-time employees employed by
Respondent at its facilities located in Hampden and Hampshire

²⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

counties including direct service advocates, service coordinators/case managers, hotline counselors, community educators, father's and youth outreach workers, program cook, housing advocates, construction managers, construction trainer, coordinator of operations, and youth development, education coordinator, teacher, counselor/case manager, rape crisis counselor, program coordinator, site coordinators, staff associates, safeplan advocates, mentor coordinators, counselor/volunteer coordinator, and youth development program coordinator, but excluding all office clerical employees, managerial employees, professional employees, confidential employees, casual employees, all relief staff, building maintenance, custodians, guards, site/program directors, and supervisors as defined in the Act.

- c. In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

- a. Reduce to writing and sign the collective-bargaining agreement reached with the Union and ratified by the employees on April 20, 2005, giving effect to its terms retroactive to April 20, 2005.
- b. Recognize and, upon the Union's request, bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit employees described above.
- c. Make all affected employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order, for any loss of earnings or benefits resulting from the failure to sign and honor the collective-bargaining agreement reached with the Union and ratified by the employees on April 20, 2005.
- d. Reimburse the Union, with interest, for any dues it was required to withhold and transmit under the collective-bargaining agreement, in a manner described in the remedy section of this Decision and Order.
- e. Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. *Bryant & Stratton Business Institute*, 327 NLRB 1135 (1994).
- f. Within 14 days after service by the Region, post at its facilities in Hampden and Hampshire counties, in the Commonwealth of Massachusetts, copies of the attached

notice marked Appendix.”²⁵ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

- g. Within 21 days after service by the Region, file with the Regional Director of Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with the provisions of this Order.

Dated, Washington, D.C., February 10, 2006

David I. Goldman
Administrative Law Judge

²⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to reduce to writing and sign the collective-bargaining agreement reached with the Union and ratified by you on April 20, 2005.

WE WILL NOT fail and refuse to recognize the Union as the exclusive bargaining representative for the following bargaining unit of its employees:

All full-time and regular part-time employees employed by Respondent at its facilities located in Hampden and Hampshire counties including direct service advocates, service coordinators/case managers, hotline counselors, community educators, father's and youth outreach workers, program cook, housing advocates, construction managers, construction trainer, coordinator of operations, and youth development, education coordinator, teacher, counselor/case manager, rape crisis counselor, program coordinator, site coordinators, staff associates, safeplan advocates, mentor coordinators, counselor/volunteer coordinator, and youth development program coordinator, but excluding all office clerical employees, managerial employees, professional employees, confidential employees, casual employees, all relief staff, building maintenance, custodians, guards, site/program directors, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reduce to writing and sign the collective-bargaining agreement reached with the Union and ratified by you on April 20, 2005, giving effect to its terms retroactive to April 20, 2005.

WE WILL, upon the Union's request, bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit employees described above.

WE WILL, make all affected employees whole, with interest for any loss of earnings or benefits resulting from our failure to sign and honor the collective-bargaining agreement reached with the Union and ratified by you on April 20, 2005.

